

Interim Guidance on *Flores v. Sessions*

I. Background

Flores is a lawsuit brought by unaccompanied alien children to enforce Paragraph 24A of the *Flores* Settlement Agreement. Paragraph 24A states: “A minor in [removal proceedings] shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates . . . that he or she refuses such a hearing.” On January 20, 2017, a district court in the Central District of California ruled that the Government was in breach of Paragraph 24A and ordered the Government to henceforth come into compliance. Order re Pls’ Mot. to Enforce, *Flores v. Sessions*, 2:85-cv-04544 (C.D. Cal. Jan. 20, 2017). On July 5, 2017, a panel of the Ninth Circuit affirmed the District Court’s order. *Flores v. Sessions*, No. 17-55208, 2017 WL 2855813 (9th Cir. July 5, 2017).

This document is intended to provide interim guidance to the immigration courts on implementing the District Court and Ninth Circuit orders as they relate to conducting bond hearings for unaccompanied children in the custody of the Health and Human Services’ (“HHS”), Office of Refugee Resettlement (“ORR”); however, this guidance is subject to change due to on-going implementation discussions and potential litigation.

II. Scope of the Agreement and Orders

The *Flores* Agreement, including the District Court and Ninth Circuit’s interpretation of it, applies nationwide. See *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016). Therefore, this guidance applies to all immigration courts that handle cases involving juvenile respondents.

The Government has reached a preliminary agreement with Plaintiffs’ counsel concerning implementation of the orders. Plaintiffs have agreed that the Government complies with the orders so long as the Executive Office for Immigration Review (“EOIR”), in coordination with ORR and the Department of Homeland Security (“DHS”), makes bond hearings available to:

- (1) Any child that ORR is holding in a staff-secure or secure facility; and
- (2) Any other child in ORR custody who has affirmatively requested a hearing by making a request with the immigration court or to an ORR care provider.

III. Procedures for Scheduling *Flores* Bond Hearings

A. Unaccompanied Children in Secure and Staff-Secure Facilities

The following process applies to children in secure and staff-secure facilities. ORR will automatically provide a notice entitled, “Notice of Right to Request a Bond Hearing,” to all unaccompanied children in its staff-secure and secure facilities of their ability request a bond hearing. The child, a legal representative of the child, or a parent/legal guardian of the child may submit a written request for a bond hearing to ORR using the ORR form. If one of these individuals requests a hearing, ORR will notify the immigration court by filing a motion for a bond hearing. **Note:** this motion is specific to unaccompanied children in secure or staff-secure facilities. **See Attachment A.** For a list of the ORR secure and staff-secure facilities and the nearest immigration courts, **see Attachment D.**

For children in secure and staff-secure facilities, upon receipt of the motion from ORR, court staff should schedule a bond hearing and mail notice to the following individuals: (1) the child, care of the custodian in charge of the ORR facility where the child is located; (2) the child’s legal representative, if any; and (3) ORR’s Director’s Office at the following address:

Director Scott Lloyd
Office of Refugee Resettlement
330 C. Street, S.W.
Washington D.C. 20201

Additionally, court staff should mail to both parties a copy of: (1) the motion and (2) any EOIR-28 that has been filed along with the notice of the scheduled bond hearing.

For the time being, HHS and ORR attorneys located in Washington D.C. will represent ORR during such bond hearings.

B. Other Children in ORR Custody

Other children who are in ORR custody but who are not in secure or staff-secure facilities (e.g., shelters) are not automatically given a “Notice of Right to Request a Bond Hearing” but may still request a bond hearing by making an affirmative request with either ORR or with the immigration court.

If a child in non-secure care makes an affirmative request with ORR for a bond hearing, ORR will file a motion with the immigration court. That motion is different from the motion filed by ORR for children in secure facilities. **See Attachment B.** In these cases, ORR may submit a letter along with the motion stating that it has determined that the child is neither a danger nor a flight-risk and that ORR will release the child once a suitable sponsor is located. In such cases, court staff should provide the motion, and any accompanying documents filed by ORR, to the immigration judge for appropriate action. The immigration judge may enter an order

granting the child's release subject to placement with a suitable sponsor without conducting an in-person hearing.¹

If a child appearing in immigration court makes an affirmative request for a bond hearing and no motion has been received from ORR, immigration court staff should send the notice contained in **Attachment C** to: (1) the child, c/o of the ORR custodian or care provider and the child's attorney, if any; and (2) ORR's Director's Office at the address above, informing ORR that an unaccompanied child in its custody has affirmatively requested a bond hearing and requesting that ORR respond within 10 days. Upon receiving a response from ORR, the child, or his or her attorney, court staff should provide the response to the immigration judge for appropriate action. ORR may respond that it has determined that the child is neither a danger nor a flight risk and that ORR will release the child once a suitable sponsor is located. If so, the immigration judge may enter an order granting the child's release subject to placement with a suitable sponsor without conducting an in-person hearing.

IV. Guidance and Information for Immigration Judges

Generally, the District Court's Order contemplates that Immigration Judges will conduct bond hearings for unaccompanied children using the same standards and factors that apply to custody redetermination hearings conducted pursuant to 8 C.F.R. § 1236.1(d)(1); however, there are some additional considerations and differences.

A. Representation

At this time, Department of Health and Human Services ("HHS") and ORR headquarters attorneys will represent ORR during these bond hearings; DHS attorneys will not be present. The HHS and ORR attorneys are located in Washington, D.C., and have very limited resources for appearing in-person at the immigration courts. As a result, they will likely request telephonic appearances. In order to ensure effective and efficient implementation of the Ninth Circuit's order, Immigration Judges should grant all requests from HHS/ORR, and any similar requests from the respondent or respondent's counsel, to appear telephonically unless there are specific and articulated reasons relating to due process concerns or another adverse impact on the efficient adjudication of the case. As outlined in Operating Policies and Procedures Memorandum (OPPM) 08-04, *Guidelines for Telephonic Appearances by Attorneys and Representatives at Master Calendar and Bond Redetermination Hearings* (July 30, 2008),

¹ In some cases involving children in staff-secure care, ORR has also found that the child will be released to a suitable custodian but has made no finding of danger to self or community. ORR will inform the immigration judge if this is the case.

Immigration Judges must adjudicate each request for a telephonic appearance on a case-by-case basis.

The child may be represented by an attorney or other representative at no expense to the government consistent with 8 C.F.R. § 1003.16(b).

B. Role of the Immigration Judge

During the hearing, an immigration judge decides whether the child poses a danger to the community or is a flight-risk. *See* Order re Pls' Mot. to Enforce 2, 2:85-cv-04544. The burden is on the child to demonstrate that he or she should be released because he or she does not pose a danger to the community or a flight risk. *Id.* In making this determination, immigration judges should apply the factors set forth in *Matter of Guerra*, 24 I&N Dec. 37, 38 (BIA 2006). *Id.* An immigration judge's decision that the unaccompanied child is not a danger to the community supersedes an ORR determination on that question, unless the Board of Immigration Appeals overturns the judge's decision. *Id.* If an immigration judge also finds that the child is not a flight risk, ORR will consider that finding when assessing the child's placement and conditions of placement, but the decision does not affect release because ORR does not make a determination of flight risk for purposes of deciding whether a child will be released.

Despite the Immigration Judge's decision on the question of danger to the community and flight risk, in all cases, release from ORR custody cannot occur until ORR has identified, evaluated and approved an appropriate sponsor. *See* 8 U.S.C. § 1232(c)(3); *Flores*, 2017 WL 2855813, at *3 ("determinations made at hearings held under Paragraph 24A will not compel a child's release. Regardless of the outcome of a bond hearing, a minor may not be released unless the agency charged with his or her care identifies a safe and appropriate placement.").

Additionally, although these hearings are known as "bond hearings," ORR does not require payment of any money in the event that bond is granted. Therefore, if release is appropriate, the Immigration Judge should not set a bond amount but should instead issue an order granting the child's release subject to ORR identifying, evaluating, and approving an appropriate sponsor.²

The District Court and Ninth Circuit orders provide no authority for an immigration judge to rule on the suitability of a sponsor or to release the child on his or her own recognizance. *Id.*

² To prevent confusion for the child, it is critical that the immigration judge include a statement in the bond hearing order that child's release is subject to the condition that ORR identifies, evaluates, and approves an appropriate sponsor.

C. Additional Information

Background information that may be useful concerning ORR's use of secure facilities is available on ORR's website at <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied> (last visited July 20, 2017). Specifically, "ORR has two levels of care for unaccompanied alien children who are assessed to be a danger to themselves or others, or who have been charged with having committed a criminal offense." *Id.* at Section 1.3.4. ORR only places an unaccompanied alien child in a secure facility if ORR determines the child poses a danger to self or others or has been charged with having committed a criminal offense. *Id.* ORR places a child in a staff-secure facility if the child "has been disruptive to the normal functioning of a shelter care provider facility such that transfer is necessary to ensure the welfare of the UAC or others; is an escape risk; has non-violent criminal or delinquent history not warranting placement in a secure care provider facility, such as isolated or petty offenses as described above; or is ready for step-down from a secure facility." *Id.* An Immigration Judge's decision that a child can be released (meaning that the immigration judge determines that the child is not a danger to community and need not remain in an ORR facility for that reason) supersedes a previous ORR decision. *Flores*, 2017 WL 2855813, at *3.

D. Appeals and Requests for a Second Bond Hearing

Immigration Judges should inform the parties of their ability to file an appeal with the Board. Either party may appeal the immigration judge's decision to the Board of Immigration Appeals ("BIA"). **Note:** If a child reserves appeal, it is prudent for Immigration Judges to inform the child (or his or her attorney) that the opposing party is HHS/ORR contrary to the current language in the appeal form (EOIR-26) which states that "the opposing party is DHS." Additionally, the EOIR-27 ("Notice of Entry of Appearance of Attorney or Representative Before the Board") does not currently list HHS/ORR on the proof of service. The child (or his or her attorney) should ensure that a copy of any EOIR-26 and/or EOIR-27 that is filed at the Board has been served on ORR (rather than DHS) at the above address.

If an immigration judge (or BIA, when appealed) determines that an unaccompanied alien child is ineligible for release, such decision is final unless the child can demonstrate a material change in circumstance to support a second request for a bond hearing. *See* 8 C.F.R. § 1003.19(e).

ATTACHMENT A:

Motion Requesting Bond Hearing for Unaccompanied Child

Secure or Staff-Secure Custody

(ORR or ORR-funded care provider to complete and file with appropriate Immigration Court)

IN THE MATTER OF: _____)
 Respondent: _____) Date: _____
 Alien Number: _____)
 _____)

**REQUEST TO SET BOND HEARING PURSUANT TO
*FLORES v. SESSIONS, 2:85-CV-04544 (C.D. Cal. Jan. 20, 2017)***

Pursuant to *Flores v. Sessions, 2:85-CV-04544 (C.D. Cal. Jan. 20, 2017)*, the above named respondent is an unaccompanied alien child who has requested a custody redetermination hearing.

The respondent is currently being held in a secure or staff-secure facility operated by the Department of Health and Human Services’ Office of Refugee Resettlement. Accordingly, the respondent respectfully requests the court schedule a bond hearing pursuant to the federal district court order.

Please direct all correspondence regarding this bond hearing, including hearing notices and the bond order rendered by the Immigration Court, to the following individuals:

Office of Refugee Resettlement
330 C. Street, S.W.
Washington D.C. 20201
Attention: Director Scott Lloyd

The respondent, care of the ORR representative, at the following address:

Program Director of ORR-funded care provider: _____
Address of ORR-funded care provider: _____

Check box if the respondent is represented by an attorney or accredited representative.

Name of Respondent’s Attorney/Representative: _____
Address of Attorney/Representative: _____

ATTACHMENT B:
Motion Requesting Bond for Unaccompanied Child
(Non-Secure) Shelter Care

(ORR or ORR funded-care provider to complete and file with appropriate Immigration Court)

IN THE MATTER OF: _____)
Respondent: _____)
Alien Number: _____)
Date: _____)
_____)

REQUEST TO SET BOND HEARING PURUSANT TO
FLORES v. SESSIONS, 2:85-CV-04544 (C.D. Cal. Jan. 20, 2017)

Pursuant to *Flores v. Sessions*, 2:85-CV-04544 (C.D. Cal. Jan. 20, 2017), the above named respondent is an unaccompanied alien child who has requested a bond hearing.

The respondent is currently being held in a non-secure shelter operated by the Department of Health and Human Services’ Office of Refugee Resettlement (ORR). The respondent requests that the Immigration Judge schedule a bond hearing.

Please direct all correspondence regarding this bond-hearing request, including hearing notices (if appropriate) and the bond order rendered by the Immigration Court, to the following individuals:

Office of Refugee Resettlement
330 C. Street, S.W.
Washington D.C. 20201
Attention: Director Scott Lloyd

The respondent, care of the ORR representative, at the following address:
Program Director of ORR-funded care provider: _____
Address of ORR-funded care provider: _____

Check box if the respondent is represented by an attorney or accredited representative.
Name of Respondent’s Attorney/Representative: _____
Address of Attorney/Representative: _____

ATTACHMENT C:

Notice to HHS/ORR re Requested Bond Hearing

(To be completed by Immigration court staff and submitted to BOTH (1) minor respondent’s custodian and (2) ORR address below, as well as (3) Respondent’s attorney, if relevant).

(1) Respondent: _____
Alien Number: _____
C/o Custodian: _____
Shelter: _____
Shelter Address: _____

(2) E. Scott Lloyd
Director
Office of Refugee Resettlement
330 C Street, S.W.
Washington, D.C. 20201

(3) Respondent’s Attorney: _____
Office: _____
Address: _____

(if relevant)

IN THE MATTER OF:)
)
Respondent: _____)
)
Alien Number: _____)
)
Date: _____)
_____)

**NOTICE OF REQUEST FOR BOND HEARING PURUSANT TO
*FLORES v. SESSIONS, 2:85-CV-04544 (C.D. Cal. Jan. 20, 2017)***

The above named respondent is an unaccompanied alien child in your custody who has affirmatively requested a custody redetermination hearing before the immigration court pursuant to *Flores v. Sessions, 2:85-CV-04544 (C.D. Cal. Jan. 20, 2017)*.

Please submit a response to the immigration court, in writing, within 15 days regarding whether or not:

- HHS, ORR has determined that the respondent is a danger or a flight risk;
- HHS, ORR has determined that the respondent is not a danger or a flight risk; or
- HHS, ORR has not determined whether the respondent is a danger or a flight risk.

Additionally, please respond whether or not HHR/ORR plans to release the respondent to a suitable custodian.

CERTIFICATE OF SERVICE

This document was served by: Mail (M) | Personal Service (P)

To: Alien Alien c/o custodial officer Alien's Attorney HHS

Date: _____ By: _____ Court _____ Staff _____

ATTACHMENT D:**Staff-Secure and Secure Facilities and Immigration Court List**

State	Location	Facility/Shelter Name	Immigration Court and Address
CA	Fairfield	BCFS Fairfield	San Francisco Immigration Court 100 Montgomery St., Suite 800 San Francisco, CA 94104 (415) 705-4415
	Woodland	Yolo County	San Francisco Immigration Court 100 Montgomery St., Suite 800 San Francisco, CA 94104 (415) 705-4415
OR	Portland	Morrison Paso Staff-secure	Portland Immigration Court 1220 SW 3rd Ave., Suite 500 Portland, OR 97204 (503) 326-6341
WA	Renton	Friends of Youth	Seattle Immigration Court 1000 Second Ave., Suite 2500 Seattle, WA 98104 (206) 553-5953
	Seattle	Selma Carson	Seattle Immigration Court 1000 Second Ave., Suite 2500 Seattle, WA 98104 (206) 553-5953
IL	Chicago	Heartland IYC	Chicago Immigration Court 525 West Van Buren Street Suite 500 Chicago, IL 60607 (312) 697-5800
TX	San Antonio	BCFS San Antonio Staff-secure	San Antonio Immigration Court 800 Dolorosa St., Suite 300 San Antonio, TX 78207 (210) 472-6637
	Manvel	Shiloh Treatment Center	Houston Immigration Court 600 Jefferson Street, Suite 900 Houston, TX 77002 (713) 718-3870
	Houston	SWK Mesa Staff-secure	Houston Immigration Court 600 Jefferson Street, Suite 900

			Houston, TX 77002 (713) 718-3870
	Brownsville	SWK Nueva Esperanza Staff-secure	Harlingen Immigration Court 2009 West Jefferson Ave., Suite 300 Harlingen, TX 78550 (956) 427-8580
NY	Dobbs Ferry	Children's Village Staff-secure	New York Immigration Court 26 Federal Plaza 12th Floor, Room 1237 New York, NY 10278 (917) 454-1040
	Syosset	MercyFirst	New York Immigration Court 26 Federal Plaza 12th Floor, Room 1237 New York, NY 10278 (917) 454-1040
VA	Staunton	Shenandoah Secure	Arlington Immigration Court 1901 South Bell Street, Suite 200 Arlington, VA 22202 (703) 603-1300